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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an administrative agency's construction of a statute is entitled to judicial deference when the agency, in the absence of notice and opportunity for public comment, promulgates a regulation without attention to the specific issue of statutory construction and then, again in the absence of notice and opportunity for public comment, adopts an "interpretation" based solely upon the language of its earlier regulation and without any consideration of the statutory language, congressional purpose, regulatory history, or relevant factual background.

2. Whether oil wells of the type commonly referred to in the industry as "injection wells" must be excluded from the calculation of "average daily production" in applying the statutory exemption from price controls for crude oil produced from properties whose "average daily production . . . does not exceed ten barrels per well."*

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* The petitioners before this Court were the appellees in the court of appeals, and they are listed in Appendix K, *infra*. Their parent companies, subsidiaries, and affiliates, other than wholly owned subsidiaries, are listed in Appendix L, *infra*. The respondents here, James B. Edwards, Secretary of Energy, and the Department of Energy, were the appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The plaintiffs in this multidistrict litigation hereby petition for a writ of certiorari to review the judgment of the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is reported at 520 F. Supp. 1232 (D. Kan. 1981). An earlier opinion of the district court (App. C, *infra*), granting summary judgment for the original plaintiffs, is reported at 447 F. Supp. 1135 (D. Kan. 1978). The opinion of the court of appeals reversing that judgment (App. D, *infra*) is reported at 589 F.2d 1082 (TECA 1978). The opinion of the Judicial Panel on Multidistrict Litigation consolidating nineteen separate actions for further proceedings in the district court (App. E, *infra*) is reported at 472 F. Supp. 1282 (J.P.M.L. 1979). The sub-

sequent opinion of the court of appeals denying the government's petition for a writ of mandamus to prohibit further proceedings in the district court (App. F, *infra*) is reported at 613 F.2d 305 (TECA 1979).

JURISDICTION

The judgment of the court of appeals (App. G, *infra*) was entered on July 29, 1982. The court's order denying rehearing with suggestion of rehearing *en banc* (App. H, *infra*) was entered on September 10, 1982. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULING INVOLVED

The pertinent statutory and regulatory provisions and administrative ruling are set forth in Appendix I, *infra*.

STATEMENT

During the period from August 19, 1973, through January 27, 1981, the petroleum industry was subject to a special program of federal price controls. Throughout virtually all of that period, however, a series of statutes exempted from price controls the first sales of crude oil produced from properties whose average daily production of crude oil did not exceed ten barrels per well. This multidistrict litigation concerns the application of the statutory exemption to secondary recovery projects that utilize "injection wells." The issue affects thousands of producers of crude oil and royalty owners and several state governments. This litigation alone directly involves more than one billion dollars. *See* App. B, *infra*, p. 39a.

1. *The nature of injection wells.* The primary recovery of crude oil utilizes natural underground pressures to drive oil to the well bore through which it is recovered.

App. B, *infra*, p. 42a. Usually only fifteen to fifty percent of the crude oil contained in a reservoir can be recovered in this manner, however. *Id.* at 43a. Further recovery requires the injection of water or other matter into the producing formation. *Id.*

> A water injection recovery system requires at a minimum two oil wells. One well is the injection well and is used as a vehicle to inject water into the oil formation. The other well is the recovery well and is used as the conduit to remove the oil forced into the well bore. Typically, an injection well is a former recovery well which has been converted to injection. Physically, there is little difference between the structure of an injection well and the structure of a recovery well.

Id. See also id. at 108a. The use of injection wells, known as "secondary recovery," is of critical importance to the domestic production of crude oil. "In 1973, approximately one billion barrels of oil were produced through the injection process. Thirty to fifty percent of all oil produced in the United States was attributable to fluid injection projects." *Id.* at 46a (citations omitted).

In the major crude oil producing states, injection wells are closely regulated by state law. In order to engage in a secondary recovery project utilizing injection wells, a producer must show that the project will increase the total recovery of crude oil from the producing field; producers must obtain permits to drill injection wells or to convert recovery wells to injection. *Id.* at 49a-52a. Once an injection well is completed, an "allowable," *i.e.*, the amount of crude oil that a well may lawfully produce, may be assigned to it by the state for proration purposes:

> . . . even if a well was drilled to be operated as an injection well, the operator must use that well as a recovery well for twenty-four hours to determine how much oil that well can recover in that period.

> The amount of oil that the well emits in that test period is assigned to that well as its allowable.
>
> When the test is completed and the wells are converted to injection wells, the allowable of those wells are transferred to other specific recovery wells on the property. Thus, if prior to injection, an injection well has an allowable of five barrels per day, and a recovery well has an allowable of six barrels per day, the allowable of the injection well can be transferred to the recovery well so that the recovery well could extract eleven barrels per day.

Id. at 50a-51a (citations omitted).

Injection wells long have been treated in the same manner as recovery wells under federal law. *Id.* at 52a-56a. The Mineral Land Leasing Act of 1920, 41 Stat. 437 (1920), as amended, 49 Stat. 676 (1935), which is administered by the Secretary of Interior, imposes standard royalty provisions for oil and gas leases on federal lands but exempts from those provisions all "stripper well leases," *i.e.*, leases whose "average daily production . . . [does] not exceed ten barrels [of crude oil] per well per day." *Id.* at 54a. Since 1936, the regulations of the Department of Interior have provided that injection wells "shall be counted as producing wells" in administering this statute. 30 C.F.R. § 221.49(b); 56 I.D. 415, 427 (1936). *See also* App. B, *infra*, pp. 54a-55a. Injection wells also are treated as "oil and gas wells" under section 263 of the Internal Revenue Code, 26 U.S.C. § 263. *See* Rev. Rul. 69-583, 1969-2 C.B. 41.

2. Statutory and regulatory background.

a. *The TAPAA and the EPAA.* The operation of stripper properties, *i.e.*, crude oil producing properties with low average daily production per well, is only marginally economic because the expense of production is high relative to the small amount of crude oil produced.

Once such properties are abandoned, not only is there an immediate loss of domestic production but the crude oil remaining in the reservoirs becomes unrecoverable and is lost forever. *See id.* at 44a, 72a-73a. These considerations became significant when the Cost of Living Council ("CLC"), acting pursuant to its authority under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, imposed special price controls on crude oil and petroleum products effective August 19, 1973, 38 Fed. Reg. 22536 (1973). Congress foresaw that many of these stripper properties could become uneconomic and might be abandoned if operating costs came to exceed the maximum lawful price. *See* App. B, *infra*, pp. 71a-73a. Consequently, on November 16, 1973, Congress enacted section 406 of the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 87 Stat. 590 (1973), exempting from price controls "[t]he first sale of crude oil and natural gas liquids produced from any lease whose average daily production of such substances for the preceding calendar month does not exceed ten barrels per well . . . ."

The CLC immediately implemented this statutory exemption by issuing a regulation defining "average daily production" as

> the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar month, divided by a number equal to the number of days in that month times the number of wells which produced crude petroleum and petroleum condensates, including natural gas liquids, from that property in that month.

6 C.F.R. § 150.54(s), 38 Fed. Reg. 32494 (1973). The regulation, which was issued without notice or opportunity for comment, did not address the question whether injection wells were to be counted in determining "aver-

age daily production," and there was no "specific discussion [within the agency] with respect to injection wells in the course of the development of that regulation." App. B, *infra*, p. 99a. The regulatory draftsman "did not even know what an injection well was!" *Id.* at 98a.

On November 27, 1973, Congress enacted the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 87 Stat. 628 (1973), which replaced the ESA as the basic statutory authority for the imposition of petroleum price controls. The exemption for stripper properties was preserved in section 4(e)(2)(A) of the EPAA; that provision superseded section 406 of the TAPAA, the only change being an extension of the qualifying period from the preceding calendar month to the preceding calendar year. The CLC, again without notice or opportunity for comment, promptly issued a conforming amendment to its regulation, which otherwise was left unchanged. *See* 38 Fed. Reg. 34464 (1973).

b. *Ruling 1974-29.* During the following year, many crude oil producers sought advice from the CLC and its successor agencies, the Federal Energy Office ("FEO") and the Federal Energy Administration ("FEA"), and also from the Internal Revenue Service ("IRS") (which for a time had responsibility for auditing compliance with the price controls), concerning the proper treatment of injection wells under the statutory exemption for stripper properties. App. B, *infra*, pp. 64a-66a. Officials of all four agencies advised producers that injection wells were to be counted as wells in determining a property's average daily production. *Id.* In December, 1974, however, the FEA issued Ruling 1974-29, 39 Fed. Reg. 44414 (1974), taking the opposite position that injection wells could not be counted in determining a property's average daily production for purposes of the exemption for stripper properties. The rationale advanced by the FEA

rested solely on the language of the agency's own implementing regulation:

> the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum.

Ruling 1974-29, 39 Fed. Reg. 44414 (1974).

c. *The EPCA and the ECPA.* The statutory exemption for stripper properties was repealed effective February 1, 1976, by section 401 of the Energy Policy and Conservation Act of 1975 ("EPCA"), 89 Stat. 871 (1975). It was revived just eight months later, however, by section 121 of the Energy Conservation and Production Act ("ECPA"), 90 Stat. 1125 (1976), in language essentially the same as that earlier contained in the TAPAA and the EPAA. It does not appear that Congress had Ruling 1974-29 before it at the time it enacted the ECPA. To the contrary, Senator Bellmon, a proponent of the exemption, later complained that "[w]hen we originally enacted the stripper exemption, and when we reenacted it in 1976, I certainly believed that the FEA (now Department of Energy) would follow the very sensible precedent set by the Interior Department." 123 Cong. Rec. 36058 (1977).

Following enactment of the ECPA, the FEA issued a new implementing regulation, which in all essential respects was the same as the regulation promulgated by the CLC in November, 1973. 10 C.F.R. § 212.54, 41 Fed. Reg. 48319 (1976). The FEA and its successor, the Department of Energy ("DOE"), have taken the position that Ruling 1974-29 is a controlling interpretation of this

regulation as well as of the earlier regulations promulgated under the TAPAA and the EPAA.

3. Proceedings below.

a. *The initial order granting summary judgment.* In late 1976 and early 1977, Braden-Zenith, Inc., Sierra Petroleum Co., Inc., and Energy Reserves Group, Inc. instituted separate civil actions in the United States District Court for the District of Kansas. Each plaintiff sought to enjoin the FEA from enforcing its regulations in a manner that would prohibit crude oil producers from including injection wells in the computation of average daily production per well for purposes of the exemption for stripper properties. Their actions were consolidated by the district court.[1]

The litigation initially focused on the propriety of the procedures followed by the FEA in promulgating Ruling 1974-29. On cross-motions for summary judgment, the district court held that because Ruling 1974-29 was treated by the agency as a rule of law and not merely as an interpretation, App. C, *infra*, pp. 125a-129a, and also because it had a substantial impact on the industry, *id.* at 129a-131a, the Ruling was a legislative rule "rather than an interpretive order." *Id.* at 132a. The court concluded that "[b]ecause Ruling 1974-29 was promulgated by the FEA without notice or opportunity for comment, it is void and ineffective . . . ." *Id.*[2]

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[1] The district court had jurisdiction under section 211(a) of the ESA and 28 U.S.C. § 1331.

[2] The court further held, however, that " 'good cause' existed for the CLC's failure to follow APA notice and comment procedures [in issuing the regulations under the TAPAA and the EPAA]." *Id.* at 137a.

b. *The first appeal.* The court of appeals reversed and remanded for further proceedings, with one judge dissenting. App. D, *infra*, p. 172a. There was no opinion of the court; each judge wrote separately. Judge Becker's opinion described the issue on appeal as involving solely the question whether the FEA had been required to give notice and afford an opportunity for public comment before issuing Ruling 1974-29. *Id.* at 141a. He concluded that such procedures had not been required, reasoning that the Ruling was clearly interpretative and not legislative, *id.* at 155a-158a, that a "substantial impact" did not transform an interpretative rule into a legislative rule, *id.* at 158a-167a, that Ruling 1974-29 had no "substantial impact" anyway, because it was a reasonable interpretation of the regulations, *id.* at 167a-168a, that the Ruling in any event was not even a "rule" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4), because as a mere interpretation it had no "future effect," *id.* at 169a-172a, and, finally, that failure to follow the procedural requirements of the APA would have been at worst only harmless error, *id.* at 172a. Judge Christensen concurred "in the result reached . . . and with most of Judge Becker's analysis and reasoning . . . ." *Id.* at 175a. He was "troubled by the unqualified assertion that there is nothing in the APA to warrant employment of the 'substantial impact' test to classify interpretative and legislative rules," *id.*, but he viewed Ruling 1974-29 as "essentially the sort of an interpretation that must have been intended by the APA exception to the rulemaking requirement." *Id.* at 177a. Judge Zirpoli dissented on the ground that Ruling 1974-29 was a legislative rule by virtue of its substantial impact on the industry. *Id.* at 184a-194a.

c. *Consolidation of multidistrict litigation.* After this litigation had begun, a large number of similar actions were filed around the country. App. E, *infra*, pp.

197a, 203a-204a. In June, 1979, the Judicial Panel on Multidistrict Litigation transferred these actions to the District of Kansas for consolidation with the actions brought by the original plaintiffs. *Id.* at 203a.

d. *Denial of mandamus.* After remand and consolidation, the government took the position that the decision of the court of appeals had disposed of all issues in the case and that final judgment should be entered in its favor. When the district court announced its intention to consider the validity of the agency's implementing regulations, as construed by Ruling 1974-29, the government filed a petition for a writ of mandamus in the court of appeals. App. F, *infra*, pp. 205a-206a. The same panel that had heard the first appeal considered and unanimously denied the petition. *Id.* at 205a, 216a. In doing so, the panel furnished a "clarification of what we thought was manifest in our prior decision . . . ." *Id.* at 213a.

> In sum, the present situation is that the consistency of Ruling 1974-29 with the APA has been finally established and . . . both judges concurring in the result clearly indicated the majority view that the ruling in question did not represent any substantial departure from the meaning of the regulation, and for this reason had no substantial impact as an interpretative ruling. Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decision as a whole.

Id. at 209a-210a (footnotes omitted). Thus, the court of appeals left for consideration by the district court the "unresolved issues as to whether the ruling [*sic*] in question is arbitrary, capricious or unreasonable in light of, or

is in conflict with, or is beyond the authority granted by controlling statutory provisions . . . ." *Id.* at 212a.

e. *The decision of the district court after trial.* Trial of the consolidated actions was held in January and February, 1981. After trial, the district court concluded, upon a lengthy analysis of the factual and regulatory background and the legislative history, that "the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency, and was contrary to the intent of Congress." App. B., *infra*, p. 87a. This conclusion was confirmed, the district court held, by consideration of the arbitrary and capricious manner in which the agency had adopted its regulation, *id.* at 99a, and the lack of any "rational basis for differentiating between injection and recovery wells for the purpose of this exemption," *id.* at 101a. The court found that "[t]he written material before the agency contain[ed] no basis for a decision either to include or exclude injection wells," *id.* at 96a, and that "[a] reading of the record makes it manifestly clear that the agency had *no basis* at all for making its determination," *id.* (emphasis in original). The exclusion of injection wells was, the court concluded, simply irrational:

> [A]n injection well is physically similar in construction to a recovery well. The costs associated with drilling and maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well. . . . The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. . . . The problems which the Congress envisioned are equally addressed by allowing injection wells to be included in the well count as by allowing recovery wells to be

> so counted. . . . Excluding injection wells seems as nonsensical as would be a decision to exclude fathers from a count of parents.

Id. at 101a-102a (citation and footnote omitted).

f. *The second appeal.* A new panel of the court of appeals reversed. The court agreed that "[t]here is no question that continued production . . . was the paramount sought after result from the exemption." App. A, *infra*, p. 21a. But without even alluding to the district court's findings that the costs of and regulatory restrictions on the drilling and operation of injection wells prevented any possibility of abuse, *see* App. B, *infra*, p. 84a, the court of appeals reasoned:

> Including injection wells in the count could possibly lead to a serious abuse of the purposes of the exemption. A lease operator could be encouraged to convert old abandoned wells to obtain the benefits of the exemption. . . . Ruling 1974-29 eliminates any potential for such abuse. Perhaps it could be considered an extreme measure but it is not arbitrary or capricious.

App. A, *infra*, pp. 30a-31a. In addition, the court deduced a congressional intent to exclude injection wells from the failure, in a subsequent Congress, of an effort to amend "the definition of stripper oil to include water and other injection wells in computing the average daily production per well . . . ." *Id.* at 25a.[3]

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[3] In addition, the court relied upon a statement of the plaintiffs' counsel at oral argument, which it misconstrued to mean that "[t]he amount of oil subject to the exemption under appellees' interpretation is much greater than originally anticipated and intended." *Id.* at 24a. In fact, counsel's statement pertained to all secondary recovery projects, not just to those properties that would qualify for the exemption if injection wells were included in computing average daily production. *See id.*

In the last analysis, however, the evident basis for reversal was the court of appeals' determination that the earlier appellate decisions in the case had effectively foreclosed further litigation. Although, on petition for mandamus, the earlier panel had left open the questions whether "the regulation itself was within the authority of the FEA to promulgate . . . or whether it was arbitrary or capricious," App. F, *infra*, pp. 209a-210a, the new panel once more focused on the validity not of the regulations themselves but of Ruling 1974-29. *See* App. A, *infra*, pp. 2a, 3a, 4a, 5a, 6a, 7a, 8a, 14a, 22a, 26a, 28a, 32a. The new panel stated that the earlier panel not only had "expressed a rather strong belief . . . [in the validity of] Ruling 1974-29," *id.* at 6a, but actually had "implicitly held that Ruling 1974-29 is valid," *id.* at 7a. The court further stated that while the earlier opinions had "not expressly [held] that Ruling 1974-29 is fully valid, there should have been no serious doubt that the court believed such was the case." *Id.* at 28a. The court concluded that "Ruling 1974-29 [is] valid and [therefore] reverse[d] the decision of the district court." *Id.* at 8a.[4]

REASONS FOR ALLOWING THE WRIT

This case presents an important question of statutory construction that should be settled by this Court. In its treatment of this question, the court of appeals disregarded several precedents of this Court and departed

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[4] The court explained that its treatment of the earlier opinions as dispositive was "completely supported" by the fact that Judge Becker, in *dictum* in his opinion for the court in *Wiggins Brothers, Inc.* v. *DOE*, 667 F.2d 77 (TECA 1981), *cert. denied*, 50 U.S.L.W. 3783 (U.S. March 30, 1982), had characterized his earlier opinion in the first appeal in this case as having settled all issues in this litigation once and for all. App. A, *infra*, pp. 29a-30a.

in numerous ways from the accepted and usual course of judicial proceedings. Its decision, moreover, was incorrect.

1. *The question is important.* The issue presented by this multidistrict litigation is of enormous monetary importance to the petroleum industry. In terms of the amount of money actually involved, this may well be the most significant case pending in the United States today. By the time of the district court's decision in July, 1981, "there ha[d] been accumulated in trust under court supervision a fund approximating one billion dollars, which awaits judicial distribution upon the termination of this litigation." App. B, *infra*, p. 39a. This fund, moreover, is only part of the story. It represents only the amount at issue for those plaintiffs who obtained preliminary injunctions. Additional hundreds of millions of dollars are at stake with respect to other plaintiffs as well as crude oil producers who have not participated in this litigation.[5]

This case is significant not only in monetary terms but in the breadth of its impact on the petroleum industry generally. This is not a matter that concerns only major business corporations, although their interests certainly are affected. Thousands, perhaps hundreds of thousands, of smaller businesses and individuals who own working or royalty interests in producing fields also have an immedi-

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[5] Producers not participating in this litigation nevertheless presumably will be bound by its result under the doctrine of *stare decisis*. The petitioners argued to the court of appeals that it lacked appellate jurisdiction over this case, but the court ignored that argument and proceeded to decide the merits. In view of that disposition, there is no significant prospect of further appellate adjudication elsewhere leading to a conflict among the courts of appeals, for the court below appears to have asserted exclusive jurisdiction over appeals in cases of this kind under section 211(b)(2) of the ESA.

ate and direct stake in the outcome, as do the many states that own interests in or collect severance taxes on the production of crude oil.

The significance of this case, moreover, is not limited to the prices producers were entitled to receive in the past. The outcome also will determine the application of the windfall profit tax for the present and future. Under that tax, so-called "tier 2" oil, which is subject to a reduced rate of tax on a smaller increment of profit, *see* 26 U.S.C.A. §§ 4987(b) and 4989(c) and (d), is defined as "any oil which is from a stripper well property within the meaning of the June 1979 energy regulations." 26 U.S.C.A. § 4991(d)(1)(A). Beginning in 1983, moreover, such crude oil will be completely exempt from the tax when produced by an "independent producer." *See* 26 U.S.C.A. §§ 4991(a) and (b) and 4994(g)(1) ("exempt stripper well oil"). Because it concerns the meaning to be ascribed to pivotal terms under the windfall profit tax, and in that way will continue to bear upon the incentives for domestic production of crude oil, the question presented has substantial prospective significance.

2. *The court of appeals disregarded this Court's prior decisions and substantially departed from the accepted and usual course of judicial proceedings.* The manner in which the court of appeals handled this case did not comport with proper practice and, in view of the significance of the question presented, warrants supervisory correction. The court decided the wrong issue, misapplied the earlier decisions in the case, and, in contravention of prior decisions of this Court, disregarded the district court's findings of fact and improperly relied upon subsequent congressional inaction.

a. *Wrong issue.* In its earlier opinions, the court of appeals had held only that Ruling 1974-29 had been issued in a procedurally correct fashion and that the Ruling

stated a reasonable interpretation of the agency's regulations. *See* pp. 9, 10-11, *supra*. The court had noted that this left for consideration by the district court the question whether the underlying regulations themselves, as construed by Ruling 1974-29, constituted a lawful exercise of the agency's authority to implement the statutory exemptions for stripper properties. *See* App. F, *infra*, p. 212a. This was the question considered and decided by the district court, *see* App. B, *infra*, pp. 40a, 61a, 99a-101a, 107a, and raised and discussed by all parties on appeal.[6]

The court of appeals, however, ignored this question. It treated the appeal as presenting solely "the issue of the validity of Federal Energy Administration . . . Ruling 1974-29," App. A, *infra*, p. 2a, *i.e.*, as presenting the same issue that had been decided in the earlier appellate litigation in the case. The court even justified its decision by stating that it was obligated to give the "agency's construction of its regulation great deference . . . ." *Id.* at 31a. But the issue on appeal had nothing to do with whether Ruling 1974-29 correctly construed the agency's regulations. The issue concerned the validity of the regulations themselves.

b. *Misapplication of earlier decisions.* The court of appeals' carelessness in framing the issue was not merely harmless error. It led to a misapplication of the earlier decisions in the case and resulted in a serious miscarriage of justice. The court's determination that the issue before it on appeal had been foreclosed by the earlier decisions in the case, App. A, *infra*, pp. 26a-30a, is explicable only on the theory that the court was deciding the wrong issue.

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[6] *See* Brief of Defendant-Appellant at 1; Brief of Plaintiffs-Appellees at 1.

As applied to the issue actually before it, the court's determination is both preposterous and grossly unfair.

The court's reading of its earlier decisions is refuted by the plain language of the opinion denying the government's petition for mandamus. In that opinion, the earlier panel expressly had stated that its own earlier decision "did not definitely resolve any statutory problem," App. F, *infra*, p. 212a, and the panel had left open, as "unresolved issues," *id.*, "[w]hether the regulation itself was within the authority of the FEA to promulgate . . . or whether it was arbitrary or capricious . . . ," *id.* at 209a-210a. Moreover, the new panel's reading of the earlier opinions affronts common sense. It would have been irresponsibly mischievous for the earlier panel to have required the parties and the district court to proceed through the expensive and time-consuming process of discovery and trial on an issue that the panel already had decided. If it previously had upheld the agency's regulations on the merits, the earlier panel would not have denied the government's petition for mandamus.

"[T]he effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs . . . their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267 (1910). By misreading and misapplying the earlier panel's opinion, the court below effectively deprived the plaintiffs of an opportunity to be heard on the central question of the correctness of the agency's construction of the statutory exemption. The earlier panel had left that question to be resolved later. The later panel then held that the question in fact had been resolved earlier. The plaintiffs lost the case without either panel addressing the question squarely. Such judicial sleight-of-hand is inexcusable.

c. *Disregard of the district court's findings of fact.* The court of appeals overrode the district court's findings of fact without even acknowledging that it was doing so, in blatant disregard of Fed. R. Civ. P. 52 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses"). The court of appeals asserted that to permit injection wells to be counted as wells in computing average daily production would "lead to a serious abuse," App. A, *infra*, pp. 30a-31a, and "create an opportunity for mass evasion," *id.* at 31a, such that it "could occur," *id.*, "that injection wells would spring up all over the country . . . ," *id.* If the court had read the district court's opinion with care, it would have known that this speculation was not merely unfounded but flatly incorrect. The district court had found:

> The costs of drilling or maintaining injection wells are as large or larger than comparable costs on a recovery well. Because of natural forces, *a provision allowing the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells.* Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse.

App. B, *infra*, p. 84a (emphasis added). The district court's finding on this point was supported by a wealth of evidence relating to the cost and complexity of secondary recovery projects and the state regulatory restrictions governing the drilling and use of injection wells. *See id.* at 43a-52a. It was clear error for the court of appeals not to accept this finding as controlling. *See Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 50 U.S.L.W. 4592, 4596 (U.S. June 1, 1982); *Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982); *Zenith Radio*

Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).[7]

d. *Improper reliance upon subsequent congressional inaction.* The court of appeals relied upon the inaction of a subsequent Congress in 1978 as "clear and convincing evidence that Congress intended [to exclude injection wells] when it enacted and reenacted the stripper well exemption [in 1973 and 1976]." App. A, *infra*, p. 25a. That use of subsequent congressional inaction was plainly erroneous:

> . . . statutes are construed by the courts with reference to the circumstances existing at the time of passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance . . . .

United States v. *Wise*, 370 U.S. 405, 411 (1962).[8]

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[7] The court of appeals also erred in stating that "[f]rom 1973 to 1977, the FEA applied a single and unequivocal interpretation of the stripping [*sic*] well regulations." App. A, *infra*, p. 24a. The district court specifically found that between December, 1973, and October, 1974, "oil producers [had been] advised to count injection wells . . . . [and] that the current interpretation is not one which has been followed consistently over a long period of time . . . ." App. B, *infra*, pp. 64a, 68a.

[8] The court of appeals apparently also assumed that when Congress re-enacted the exemption for stripper well properties in 1976, it did so in light of the gloss placed upon the agency's regulation by Ruling 1974-29. App. A, *infra*, p. 24a. But there is no "evidence of any particular consideration of these regulations [or Ruling] by Congress during re-enactment." *Rowan Cos.* v. *United States*, 452 U.S. 247, 262 (1981). *See also, e.g., United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

3. *The court of appeals' decision was incorrect.* DOE and its predecessor agencies exceeded their authority in excluding injection wells from the computation of average daily production for purposes of the statutory exemption for stripper properties.

a. *The agency's determination to exclude injection wells is entitled to no deference.* The court of appeals erred in giving the agency's position "great deference." App. A, *infra*, p. 31a. In determining the weight to be accorded an agency's interpretation of a statute, this Court looks to "the thoroughness evident in its consideration, [and] the validity of its reasoning . . . ." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *Accord, e.g., St. Martin Lutheran Church* v. *South Dakota*, 451 U.S. 772, 783 n.13 (1981). When the CLC promulgated its regulations implementing the TAPAA and the EPAA, it did not even consider the application of those statutes to injection wells. When the FEA issued Ruling 1974-29, it furnished no reason at all for reading the statutory exemption to exclude injection wells. The agency's position quite plainly was not "based on a consideration of the relevant factors . . . ." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

The regulations implementing the TAPAA and the EPAA were issued immediately after the enactments of those statutes, without any input from interested persons in the industry. *See* pp. 5-6, *supra*. "The written materials which the DOE has identified as the agency record on which the regulation was based contains no references to the counting of injection wells . . . [and] contains no basis for a decision either to include or exclude injection wells." App. B, *infra*, p. 96a.

> The agency did not consider the impact which excluding or including injection wells would have on domes-

> tic petroleum reserves, or on domestic oil production. The agency did not consider the role and function of injection wells in the recovery of crude oil. The agency did not consider the extent of capital costs in secondary recovery projects. The agency did not consider whether inclusion or exclusion created an incentive or disincentive for establishing secondary recovery projects, or whether exclusion of injection wells would lead to premature abandonment of marginal properties. The agency did not consider the treatment of injection wells by state agencies or by other agencies of the federal government. In short, the agency considered no "studies, analyses, information or facts" prior to the promulgation of the regulation.

Id. (citations omitted).

The wisdom of including or excluding injection wells similarly was ignored when the FEA issued Ruling 1974-29. Once again, the agency acted on its own without soliciting comments from interested persons in the industry, a procedure that makes it "likely that significant factors will be overlooked or too easily discounted." *Kollett* v. *Harris*, 619 F.2d 134, 140 n.5 (1st Cir. 1980). Ruling 1974-29 made no pretense of attempting to construe the statutory language in light of the stated congressional objectives. The Ruling did not discuss or even refer to the statutory language, the legislative purpose, or any considerations of policy or practicality. It rested solely upon language in the agency's regulation that was not contained in the underlying statutes. *See* pp. 6-7, *supra*. "This lack of specific attention to the statutory authorization," *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978), deprives the Ruling of any persuasive force. *See SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978). Moreover, the justification that the agency has reiterated throughout this litigation without ever adducing any evidentiary support, *i.e.*, that a failure to exclude injec-

tion wells would lead to abuse, not only is contrary to the facts found by the district court but also is precisely the sort of "*post hoc* rationalization[] . . . [that] cannot serve as a predicate for agency action." *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 539 (1981). *See also, e.g., Investment Co. Institute* v. *Camp*, 401 U.S. 617 , 627-28 (1971).

The court of appeals erred fundamentally in failing to take account of the manner in which the agency's regulations and Ruling 1974-29 were promulgated. The history of the evolution of the agency's position does not demonstrate the application of administrative expertise, and thus there was no reason to give weight to the agency's adoption of that position. " 'The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia . . . .' " *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968) (quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)). It was the duty of the courts below, as the district court recognized, to make an independent determination of the scope of the statutory exemption. *Cf. United States* v. *Larionoff*, 431 U.S. 864, 873 (1977); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). If the court of appeals had done so, it would have been forced to conclude that injection wells may not be excluded from the computation of average daily production under the statute.

b. *Exclusion of injection wells is inconsistent with the legislative intent and frustrates the congressional objectives.* In late 1973, the embargo imposed by the Organization of Petroleum Exporting Countries had dramatized the need for maximizing domestic production of crude oil. The exemption for stripper properties was enacted at this time as an incentive for continued production from economically marginal properties. Congress

was concerned that existing price controls on crude oil might otherwise cause the abandonment of stripper properties. *See* App. B, *infra*, pp. 71a-73a. *See also* pp. 4-5, *supra*.[9]

The overriding congressional objective was to maximize production from existing reservoirs. *See, e.g.*, 119 Cong. Rec. 23875 (1973) (Senator Hansen) ("we will squeeze every last drop of this vitally important source of energy from these wells"); *id.* at 23877 (Senator Fannin) ("the Bartlett amendment is really a conservation measure and provides an incentive not to leave oil in the ground"); *id.* at 23879 (Senator Randolph) (emphasizing the need to extract "every possible drop of oil"). The Conference Report explained that the exemption for stripper properties would

> insure that direct or indirect price ceilings do not have the effect of resulting in any loss of domestic crude oil production from the premature shutdown of stripper wells for economic reasons . . . [and] encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings.

1973 U.S. Code Cong. & Ad. News 2531-32.[10]

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[9] The court of appeals incorrectly asserted that "[p]rice controls on oil was the fundamental purpose of the legislation." App. A, *infra*, p. 31a. The exemption for stripper properties was first enacted as part of the TAPAA, which was not otherwise concerned with price controls. Moreover, the court of appeals overlooked the fact that the specific purpose of any statutory exemption is always different from, and to some extent at odds with, the general purpose of the regulatory scheme to which it applies.

[10] The Conference Report also admonished the agency to guard against the gerrymandering of lease boundaries. *Id.* at 2532-33. But there is no indication of a purpose to exclude wells operating within pre-existing lease boundaries.

In short, "[t]he stripper well exemption was designed to encourage the operation of marginally productive wells to produce oil that otherwise would not be produced." App. B, *infra*, p. 73a. The agency's construction of the exemption runs counter to that purpose. The crucial problem addressed by the statutory exemption was the high cost of operating stripper properties. That problem remains the same, whether a property is in primary recovery, utilizing only recovery wells, or in secondary recovery, utilizing both injection wells and recovery wells. "The costs associated with drilling or maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well." App. B, *infra*, p. 101a. Thus, a stripper property is no less expensive to operate, and no less economically marginal, merely because it has proceeded to secondary recovery. It follows that exclusion of injection wells is both irrational and inequitable:

> . . . consider the case of a lease containing two recovery wells, each producing 10 barrels of oil per day through each physical well bore. Under the DOE interpretation this lease would qualify. Next, consider the case of another lease containing two wells, one an injection well and the other a recovery well. If the production of the second lease is 20 barrels of oil per day through the one physical well bore, the property would not qualify under the DOE interpretation, even though the costs faced by the two leases are identical and each are subject to the same disincentive effects envisoned by Congress. The second lease would seem to be as economically marginal as the first lease. The Court can envision no principled reason these two leases should be treated in different manners, and the defendant has offered no reason.

Id. at 102a n.13.

To exclude injection wells from the operation of the statutory exemption, as the agency has done, largely

denies the exemption to properties that have undertaken secondary recovery operations and defeats the legislative purpose as applied to such properties. The agency's construction denies the exemption to many properties that had proceeded to secondary recovery prior to the institution of price controls, because wells that had been converted to injection could not be counted; and it discourages operators of properties still in primary production from proceeding to secondary recovery, even though a delay in implementing secondary recovery would cause a permanent loss of reserves. *See id.* at 44a. Congress did not intend these consequences. To the contrary, Congress had recognized that "by far the biggest percentage of production from stripper wells, 10 barrels or less, is secondary or tertiary recovery," 119 Cong. Rec. 23874 (1973) (Senator Cook), and it believed the exemption would encourage "a secondary recovery program, which is a tremendous operation and is a very high cost operation . . . ." *Id.* (Senator Bartlett).[11] As of 1973, approximately one-half of all stripper properties were engaged in secondary recovery operations, and "[i]t is totally inconceivable that Congress intended to exclude nearly half of the properties subject to the exemption." App. B, *infra*, p. 78a.

The counting of injection wells in calculating average daily production for purposes of the exemption, as counsel for the government conceded at oral argument in the

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[11] As the sponsor of the exemption, Senator Bartlett was particularly well qualified to explain its intended scope, and his views are entitled to special weight. *See FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

court of appeals,[12] would stimulate additional production of crude oil by encouraging the initiation and facilitating the continued operation of secondary recovery programs.

> The use of water injection wells is a conservation measure designed to get maximum production from the oil producing wells in a given participating area. . . . [Under the regulatory program administered by the Department of Interior,] water injection wells are permitted to be counted as oil producing wells, in determining the average daily production per well, in order to encourage lessees to drill as many injection wells as will efficiently contribute to increased production.

Marathon Oil Co. v. *Kleppe*, 556 F.2d 982, 986 (10th Cir. 1977). DOE's construction of the statutory stripper exemption as excluding injection wells from the computation of average daily production therefore "frustrate[s] the policy that Congress sought to implement," *Federal Election Comm'n* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981), and fails to "harmonize[] with the statute's 'origin and purpose.' " *United States* v. *Vogel Fertilizer Co.*, 50 U.S.L.W. 4137, 4140 (U.S. Jan. 13, 1982) (quoting *National Muffler Dealer's Ass'n* v. *United States*, 440 U.S. 472, 477 (1979)).

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[12] The Court:

> Aren't they [marginal wells] better kept in production if you do allow what they seek [counting injection wells]?

Government counsel:

> Sure. If you didn't have price controls they would make more money and you would have more production.

CONCLUSION

The petition for a writ of certiorari should be granted.

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